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M & M Affordable Plumbing, Inc. and Jeffrey Ceren.
Case 13–CA–121459

March 23, 2017

SUPPLEMENTAL DECISION AND ORDER

BY ACTING CHAIRMAN MISCIMARRA AND MEMBERS
PEARCE AND MCFERRAN

The General Counsel seeks partial summary judgment in this compliance proceeding on the basis that the Respondent's answer to the compliance specification attempted to raise matters that had been decided in the underlying unfair labor practice proceeding and is inadequate under the Board's Rules and Regulations. For the reasons that follow, we grant the General Counsel's motion.

On August 4, 2015,¹ the National Labor Relations Board issued a Decision and Order finding that the Respondent, M & M Affordable Plumbing, Inc., violated Section 8(a)(3) and (1) of the Act by discharging employee Jeffrey Ceren. *M & M Affordable Plumbing, Inc.*, 362 NLRB No. 159 (2015). Among other things, the Board ordered the Respondent to offer Ceren full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed by him. *Id.*, slip op. at 8. The Board further ordered that the Respondent make Ceren whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest compounded daily. *Id.*, slip op. at 8–9.

On October 30, based on noncompliance with the Board's Order, the Acting Regional Director for Region 13 issued a compliance specification and notice of hearing, alleging the amounts due and notifying the Respondent of its obligation to file a timely answer complying with the Board's Rules and Regulations. On November 27, the Respondent filed an answer to the compliance specification. In its answer, the Respondent denied each allegation, repeatedly asserting that the underlying unfair labor practice case was decided in error. Therefore, the Respondent asserted, it had no obligation to reinstate Ceren, and no backpay was due him. The answer also asserted that the General Counsel failed to allege or otherwise set forth any efforts by Ceren to mitigate his losses.

¹ All dates are in 2015, unless otherwise indicated.

On November 30, the General Counsel sent the Respondent's counsel a letter advising counsel that the answer was deficient because it attempted to relitigate issues that had been resolved in the underlying proceeding and lacked the requisite specificity prescribed by the Board's Rules and Regulations. The letter informed the Respondent's counsel that unless it filed an amended answer complying with the Board's Rules and Regulations by December 7, the General Counsel would file a Motion for Summary Judgment with the Board.

No such amended answer was filed, and on December 15, the General Counsel moved for partial summary judgment on the compliance specification, stating that the Respondent's answer failed to meet the specificity requirements of the Board's Rules and Regulations. The General Counsel asserts that the Respondent's answer did little more than attempt to relitigate the Board's conclusions in the underlying unfair labor practice proceeding, and points out that the Respondent failed to set forth any alternative calculations of backpay. The General Counsel therefore asserts that the Board should grant summary judgment as to the calculation of gross backpay.²

On December 18, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's motion should not be granted. The Respondent filed a brief in opposition to the General Counsel's motion on January 4, 2016.

On the entire record, the Board makes the following

Ruling on the Motion for Partial Summary Judgment

Section 102.56(b) and (c) of the Board's Rules and Regulations states, in relevant part:

(b) *Contents of answer to specification.* The answer shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification at issue. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent

² The General Counsel acknowledges that the Respondent's general denials of certain aspects of interim earnings pled in the compliance specification may be sufficient to require a hearing in which the Respondent will be required to carry its burden of proving interim earnings. The General Counsel further asserts, however, that in any such hearing the Respondent should be precluded from introducing evidence or arguments as to the General Counsel's calculation of gross backpay.

disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.

(c) *Effect of failure to answer or to plead specifically and in detail to backpay allegations of specification . . .* If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting the allegation.

We examine whether the Respondent's answer, as supplemented by its opposition brief, satisfies the requirements of Section 102.56(b).

1. Backpay period

(Paragraphs I and II of specification)

Paragraph I of the specification alleges that the backpay period begins on September 24, 2013, the date of Ceren's discharge, and ends when the Respondent extends Ceren a valid offer of reinstatement or until the Respondent's reinstatement obligation is otherwise extinguished for nondiscriminatory reasons. The Respondent denies paragraph I, arguing that the Board's decision was made in error, and therefore, Ceren is due neither reinstatement nor backpay. More specifically, the Respondent denies that Ceren was employed by the Respondent or that he was discharged on September 24, 2013.

In the underlying proceeding, the Board, adopting the decision of the administrative law judge, found that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Ceren because he was a union member. 362 NLRB No. 159, slip op. at 5. It further found that the Respondent had violated the Act by conditioning Ceren's employment on withdrawal from the Union. *Id.*, slip op. at 6. The Board rejected the Respondent's arguments that it had never hired, employed, or discharged Ceren, and that Ceren was not an employee of the Respondent under Section 2(3) of the Act but rather held a managerial position or was an independent contractor. *Id.*, slip op. at 3 fns. 6, 7.

It is well settled that an employer may not relitigate matters in the compliance stage that were decided in an underlying unfair labor practice proceeding. *M.D. Miller Trucking and Topsoil, Inc.*, 363 NLRB No. 49, slip op. at

2 (2015); *Convergence Communications, Inc.*, 342 NLRB 918, 919 (2004). Here, in contending that neither backpay nor reinstatement was warranted because "the Board's decision was in error," and that it had neither employed nor discharged Ceren, the Respondent attempts to do just that. Accordingly, we agree with the General Counsel that summary judgment is warranted as to paragraph I.³

2. Gross backpay and excess tax

(Paragraphs III and VI of specification)

Paragraph III(a) of the specification addresses the method by which backpay was calculated. It sets forth the following formula: "An appropriate measure of the gross backpay due Ceren is based [on] the total annual salary divided by the number of hours worked by a full-time employee and the value of a pretax benefit received as fuel directly from Respondent's gas pump."

In addition to arguing that "the Board's decision was made in error and that no backpay is due," the Respondent also denies "that the alleged 'value of a pretax benefit' concerning the receipt of fuel is an appropriate component of backpay." The Board's decision specifically found that Ceren was allowed to take gasoline from the Respondent's pump free of charge, and that this was an in-kind payment to Ceren that was part of "a scheme [hatched] by" him and the Respondent's owner Michael Malak to pay Ceren in an indirect fashion that would hide from the Union that Ceren was employed by the Respondent. See *M & M Affordable Plumbing*, supra, slip op. at 3-4. Even without regard to motive, it is well established that gross backpay encompasses in-kind benefits. See *Teamsters Local 164*, 274 NLRB 909, 910-911 (1985), enfd. 835 F.2d 879 (6th Cir. 1987); *Amshu Associates, Inc.*, 234 NLRB 791, 796 (1978). These benefits include items such as telephone and gasoline privileges. See *Teamsters Local 164*, supra, at 910-911. Therefore, we grant summary judgment for the General Counsel on this issue.

Paragraph III(b) states that "Ceren's negotiated annual salary is assumed to reflect full-time employment of 40 hours per week, 520 hours per calendar quarter, and 2,080 hours per calendar year." After its standard contention that no backpay is due because the Board erred in the underlying decision, the Respondent states that it

³ Paragraph II simply defines the term "calendar quarter" as used in the specification. The Respondent admits "that the Specification sets forth the referenced time periods," but "denies they have any applicability to Ceren's proposed employment with Respondent," and once again contends that "the Board's Decision was made in error." As the Respondent's answer to paragraph II relies on an attempt to relitigate the underlying Board decision, summary judgment is also granted as to paragraph II. See *M.D. Miller*, supra, slip op. at 2.

“admits that the Board is making the assumptions alleged in relation to Ceren’s alleged employment with Respondent, but denies the accuracy of the assumptions because they do not reflect the anticipated number of weeks to have been worked by Ceren under the proposed employment with Respondent.” Here, the Respondent’s references to Ceren’s “alleged” and “proposed” employment, following on the heels of its oft-repeated contention that “the Board’s decision was made in error,” strongly suggest that the Respondent is merely attempting to relitigate the underlying decision. That is, its “argument” appears to be that the “anticipated number of weeks to have been worked by Ceren” set forth in the specification is in error because Ceren was never employed by the Respondent—an argument that was, as stated above, rejected in the underlying decision. To the extent that the answer can be read as going beyond relitigation of the Board’s finding that Ceren was an employee of the Respondent, it is insufficient under the Board’s Rules because although this is a matter within the Respondent’s knowledge, the answer lacks any explanation of the basis for the Respondent’s disagreement with the General Counsel’s premise of a 40-hour week, and does not set forth any proposed alternative figure. Rules and Regulations Section 102.56(b); *Shenandoah Coal Co.*, 312 NLRB 30, 30–31 (1993).⁴

In its answers to the remainder of Paragraph III, the Respondent does little more than contend that the underlying decision was in error. To the extent it denies any specific allegations made by the General Counsel, see Paragraphs III(e) and (f), its answer relies on unsupported and unexplained assertions, which, as explained above, are insufficient under the Board’s Rules.

Paragraph VI, as supplemented by exhibit 3 to the compliance specification, alleges with specificity the compensation Ceren should receive to offset the adverse tax consequences of receiving a lump-sum backpay award for a period of over 1 year. In its answer, the Respondent repeats that the underlying Board decision was in error and takes issue with specific findings made in that decision. The Respondent’s answer fails to comply with Board law, which requires the Respondent to specifically rebut allegations regarding adverse income tax consequences. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10, slip op. at 6 (2014).

For the reasons stated above, we agree with the General Counsel that, pursuant to Section 102.56(b) and (c) of the Board’s Rules and Regulations, summary judgment is warranted as to paragraphs III and VI of the compliance specification.

3. Interim earnings and expenses
(Paragraphs IV-V of specification)

Paragraph IV contains allegations such as the name of an interim employer that Ceren allegedly worked for and the wage information that this employer submitted to the General Counsel. It further sets forth certain premises that the General Counsel used in calculating Ceren’s interim earnings. Paragraph IV also incorporates exhibits 1 and 2, which set forth calculations regarding Ceren’s interim employment. Paragraph V states that net backpay for each calendar quarter is the difference between Ceren’s gross backpay and interim earnings, and that the total amount due, without interest, is set forth as a total for each quarter under “Net Backpay and Expenses” in exhibit 1. The Respondent’s answers to paragraphs IV and V consist of its standard assertions regarding the Board’s alleged error in the underlying proceeding and as to certain findings therein, and general denials.

As the General Counsel acknowledges, where information is not within the Respondent’s knowledge, such as a discriminatee’s interim earnings and expenses, a general denial is sufficient to warrant a hearing on those issues. *Douglas Electrical Contracting*, 337 NLRB No. 47, slip op. at 2 (2001) (not reported in Board volumes); *Dews Construction Corp.*, 246 NLRB 945, 947 (1979). Accordingly, we shall order a hearing limited to the issues of Ceren’s interim earnings and expenses. The Respondent shall not be permitted, however, to relitigate any issues resolved in the Board’s underlying decision, nor to introduce evidence to challenge the gross backpay calculations and conclusions contained in the compliance specification.⁵

ORDER

IT IS ORDERED that the General Counsel’s Motion for Partial Summary Judgment is granted except with regard to allegations concerning Ceren’s interim earnings and expenses.

⁴ The General Counsel requests that we strike the Respondent’s contentions that the Board’s underlying decision was in error and that it has no backpay or reinstatement obligations to Ceren, and its related contentions that attempt to relitigate issues resolved in the earlier proceeding. Given that we have granted the motion for partial summary judgment, we find it unnecessary to strike any portion of the Respondent’s answer.

Acting Chairman Miscimarra agrees that partial summary judgment is appropriate in this compliance proceeding for the reasons stated in this Supplemental Decision (with the qualification he noted above). Acting Chairman Miscimarra has not previously participated in this case, and he does not reach or pass on the merits of the underlying unfair labor practice decision.

⁴ In finding summary judgment warranted as to paragraph III(b) of the compliance specification, Acting Chairman Miscimarra relies only on the insufficiency of the Respondent’s answer under Sec. 102.56(b) of the Board’s Rules and Regulations.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 13 for the purpose of arranging a hearing before an administrative law judge on the issues of interim earnings and expenses.

Dated, Washington, D.C. March 23, 2017

Philip A. Miscimarra, Acting Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD